Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	

GE AMERICAN COMMUNICATIONS, INC. COMMENTS SUPPORTING IN PART AND OPPOSING IN PART THE PETITIONS FOR RECONSIDERATION

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August 18, 1997

TABLE OF CONTENTS

SUMMARY

GE American Communications, Inc. ("GE Americom") supports the Petition for Reconsideration and/or Clarification of Columbia Communications Corporation ("Columbia"). Columbia correctly points out the need for the Commission to clarify the application of the new universal service rules to satellite companies. Columbia is correct that when a company launches a satellite and provides bare space segment, revenues from that line of business should not contribute. This is true both because the space segment is sold on a non-common carrier basis, and more fundamentally because the provision of space segment alone is not the provision of "telecommunications" as defined in the 1996 Act. Rather it is the purchaser of the space segment who adds other network elements to create a transmission path of its own design, manages that path, and distributes information over the path either on its own behalf or on behalf of others.

Columbia also is correct that even when a satellite operator uses its space segment to provide telecommunications, it should not contribute when it does so on a private carrier basis. GE Americom agrees with other petitioners who urge the Commission to return to the Joint Board approach and refrain from imposing universal service charges on non-common carriers in general. But Columbia notes the special circumstances of satellites that make this treatment particularly appropriate for the satellite industry.

On the other hand, the Commission should reject the suggestion of a few petitioners that service providers should not be allowed to flow through the new

cost of universal service to their term customers. This is a particularly important issue for the satellite industry if the Commission fails to make the clarifications requested by Columbia (and by GE Americom in its own petition for clarification or reconsideration). Satellite operators are unique in that the majority of their revenues come from very long term contracts, often lasting for the life of a satellite. If any of those revenues are included in the universal service calculation, then it would be an unlawful taking in violation of the Fifth Amendment to deny operators the ability to recover that cost. GE Americom does not want to reopen our contracts and increase rates; we have explained why most of the activity under those contracts falls outside the scope of Section 254 either as a matter of law (bare space segment) or as a matter of policy (non-common carrier satellite telecommunications). However, insofar as the Commission imposes the contribution obligation on any party, it must give that party the opportunity to recover the cost from its customers.

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INTRODUCTION

GE American Communications, Inc. ("GE Americom"), by its attorneys, hereby submits its comments on the petitions filed by other parties for reconsideration and/or clarification of the *Report and Order* in this proceeding. 1/

First, GE Americom supports the petition filed by Columbia Communications Corp. ("Columbia"). 2/ That petition is consistent with GE Americom's own Petition for Clarification or Reconsideration, 3/ where we asked the Commission to clarify the *Order*'s treatment of satellite services. In particular, we

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1/ Report and Order, CC Docket No. 96-45, FCC 97-157 (released May 8, 1997) ("*Report and Order*" or "*Order*").

2/ See Columbia Communications Corporation Petition for Reconsideration and/or Clarification (filed July 17, 1997) ("Columbia Petition").

3/ See Petition for Clarification or Reconsideration of GE American Communications, Inc. (filed July 17, 1997) ("GE Americom Petition").

requested express clarification that, to the extent satellite operators provide bare transponder space segment capacity, they are not subject to universal service contribution obligations because that function is not "telecommunications" as defined by the 1996 Act. 4/ Columbia's petition contains further support for clarification of the treatment of satellite companies.

Second, GE Americom opposes the comments of those who would deny companies the opportunity to modify contracts to recover new universal service costs imposed by the *Order*. GE Americom does provide certain telecommunications services that will be subject to contribution obligations. With respect to these obligations, we show below that -- contrary to the petitions of the Ad Hoc Telecommunications Users Committee ("Ad Hoc Users") and the American Petroleum Institute ("API") -- the Commission has no lawful option other than to enable telecommunications providers to modify contracts to pass through such amounts to customers. The Commission should affirm and clarify this holding.

I. COMMISSION SHOULD CLARIFY THAT SATELLITE COMPANY REVENUES CONTRIBUTE ONLY WHEN DERIVED FROM COMMON CARRIER TELECOMMUNICATIONS SERVICES.

The *Order* explicitly concludes that "satellite and video providers must contribute to universal service only to the extent that they are providing interstate

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4/ In the alternative, we sought reconsideration of the *Order* to the extent our understanding of this result is incorrect. GE Americom Petition.

telecommunications services[,]" *i.e.*, common carrier services. 5/ In GE Americom's Petition, we demonstrate that that this holding should be affirmed and clarified. 6/ We also show that the Commission lacks statutory authority under Section 254(d) of the Act to impose universal service contribution obligations to the extent that satellite operators sell transponders on their satellites or otherwise make available transponder capacity (*i.e.*, bare space segment), because the provision of a piece of telecommunications equipment like a transponder does not constitute the provision of a "telecommunications service" or "telecommunications" under the Act. 7/ Rather, purchasers of transponders or transponder capacity must combine the use of that equipment with other telecommunications network facilities, such as their own licensed earth stations, to provide "telecommunications" either on their own behalf or for others. 8/

5/ *Order*, ¶ 781; *see also* ¶ 796.

6/ GE Americom Petition at 5-8.

7/ See GE Americom Petition at 8-10. *Compare* 47 U.S.C. § 153(45) (definition of "telecommunications equipment" as "equipment . . . used by a carrier to provide telecommunications services") *with* 47 U.S.C. §§ 153(43) (definition of "telecommunications" as "the transmission between or among points specified by the user, of information of the user's choosing . . . .") and 153(46) (definition of "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used").

8/ As explained in GE Americom's Petition, in the context of bare space segment offerings, satellite operators' responsibilities are limited to making sure that the transponder used by the customer is available and working properly. It is the customer, not the satellite operator, that decides how to use the transponder to communicate, and arranges for earth stations to transmit and to receive

[Footnote continued]

Columbia is the only other party that explicitly addresses satellite issues. GE Americom agrees with and supports Columbia's contentions that: (a) providers that do not benefit from the public switched telephone network ("PSTN") should not be required to contribute; 9/ (b) satellite operators, with individualized, long-term contracts with their customers, would be uniquely and substantially harmed by the imposition of universal service obligations; 10/ and (c) imposition of universal service support on U.S.-based international satellite operators would undermine U.S. trade policy by placing them at an unreasonable competitive disadvantage in competition with foreign satellite operators. 11/

First of all, Columbia is correct that revenues that a space station operator receives from the sale of bare space segment should not be included in universal service calculations. This is so not only because such space segment is sold under private contracts, as Columbia observes, but more fundamentally because (as noted) such sales do not involve the provision of "telecommunications."

[Footnote continued]

information, as well as additional terrestrial links to take the communications to and from the earth stations. In this way, the customer: (1) creates a transmission path of its own design; (2) manages that transmission path; and (3) distributes information over that path, either on its own behalf or on behalf of others. GE Americom Petition at 3-4.

9/ Columbia Petition at 5-6.

10/ *Id.* at 6-7; *see also* GE Americom Petition at 12-14.

11/ Columbia Petition at 8-9.

In that regard satellite space segment is distinguishable from the products of certain other petitioners seeking exclusion from the fund. We take no position, for example, regarding the arguments of commercial mobile radio service ("CMRS") carriers 12/ and non-profit telephone cooperatives. 13/ But those companies at least are engaged in the provision of "telecommunications services" -- while as noted bare space segment is not "telecommunications" at all.

As a separate line of business, satellite operators also may market "telecommunications" offerings -- that is, actually provide "transmission between or among points specified by the user, of information of the user's choosing . . . ." 14/ Columbia, like GE Americom, asks the Commission to clarify that when satellite telecommunications is sold on a private contract basis, it is exempt from the general obligation of non-common carrier telecommunications offerings to contribute. GE Americom also supports the more general position of the Information Technology Association of America ("ITAA"), and others that requiring contributions from any non-common carrier provider of telecommunications would raise insurmountable practical difficulties and would undermine the public interest. We supported the original position of the Joint Board in the Recommended Decision that only common carrier services should contribute.

12/ *See, e.g.*, Petitions of PCIA, Teletouch, ProNet, and Ozark Telecom.

13/ *See, e.g.*, Petitions of Ad Hoc Users and Iowa Telecommunications & Technology Council Petition.

14/ 47 U.S.C. § 153(43).

But in any event, Columbia presents strong arguments why non-common carrier satellite telecommunications offerings in particular are properly exempted. They have no linkage to the PSTN or the underlying purposes and benefits of universal service. If such non-common carrier services were to be included, satellite operators would face substantial administrative and practical problems like those cited by other private network providers. In sum, the Commission should reaffirm that only common carrier satellite services are subject to universal service contribution obligations.

II. THE COMMISSION SHOULD NOT RECONSIDER ITS DECISION THAT CONTRIBUTORS MAY MODIFY THEIR CONTRACTS TO RECOVER THEIR CONTRIBUTION OBLIGATIONS FROM THEIR CUSTOMERS.

The *Order* explicitly provides that parties required to make contributions may reopen term contracts to recover their contribution obligations from customers:

> [W]e find that universal service contributions constitute a sufficient public interest rationale to justify contract adjustments. . . . By assessing a new contribution requirement, we create an expense or cost of doing business that was not anticipated at the time contracts were signed. Thus, we find that it would serve the public interest to allow telecommunications carriers and providers to make changes to existing contracts for service in order to adjust for this new cost of doing business. 15/

15/ *Order*, ¶ 851.

This conclusion is relevant to satellite operators to the extent that they provide common carrier services, since such services contribute. It would become critical to the industry to the extent that the Commission goes further and also reaches non-common carrier satellite services or attempts to reach bare transponder space segment (notwithstanding that, as discussed above, space segment is not "telecommunications"). The satellite industry already has committed substantial amounts of its space segment capacity under long-term contracts, often for the entire useful life of a satellite, and sometimes for satellites that have not even been launched. To the extent that the Commission imposes a new universal service charge on revenues that satellite companies receive under term contracts, then we must be able to recover that cost.

Ad Hoc Users and API make arguments challenging the "flow through" provision of the Commission's *Order*, but those arguments are without merit. 16/ First of all, it would be an unlawful taking in violation of the Fifth Amendment of the U.S. Constitution to force companies to contribute to universal service without giving them the ability to recover that cost. The Commission is obligated to permit companies to charge just and reasonable rates, *i.e.*, rates that permit the company to earn "enough revenue not only for operating expenses but also for the capital costs of the business." 17/ The end result must be that the company has an

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16/ See Ad Hoc Users Comments at 2-11; API Comments at 3-8

17/ *Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591, 603 (1944); *Jersey Central Power and Light v. FERC*, 810 F.2d 1168, 1176 (D.C. 1987).

opportunity to earn a return that is "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital." 18/ Imposing a substantial regulatory cost on a company, and failing to provide even the opportunity to recover that cost, would violate this constitutional requirement.

The takings issue is particularly strong in the case of satellite companies. The satellite industry is fundamentally different from every other industry that will contribute to universal service. First, in the ordinary case the Commission is dealing with industries who already are contributing to universal service through a different mechanism. In contrast, satellite companies have no linkage to the PSTN, have not been part of telephony subsidies in the past, will draw no benefit from the fund, and will not see any countervailing rate reduction.

Second, and even more important, most industries will be able to readily recover the new contribution charge easily through new rates because relatively little of their service is committed under long term contracts. Thus, the contribution cost can be easily spread across the carrier's entire customer base and recovered in the ordinary course, with no material distortions of customer expectations or cost burdens. 19/

18/ *Id.*

19/ To the extent that those companies have preexisting term contracts at fixed prices, two factors ameliorate the situation and may make it less necessary to reopen those contracts. First, the term contracts are generally a very small percentage of the carrier's overall revenue, so even without modifying those contracts providers could avoid materially distorting new customer rates when recovering the overall universal service cost. Second, the terms of the fixed price

[Footnote continued]

In contrast, the satellite industry uniquely involves a disproportionate percentage of very long term contracts -- entered into with no contemplation of universal service contributions -- that will continue in place for years to come. Thus, particularly if space segment revenues are forced to contribute, satellite companies would face a significant new cost of doing business, and they must be able to reopen existing contracts to recover that cost. Grant of the Ad Hoc and API petitions would instead violate the takings clause by substantially increasing a satellite company's cost of doing business without giving it an opportunity to recover the new costs. It could strip away a substantial percentage of the company's profit margins, to the direct detriment of shareholders and the ability of the satellite company to continue its operations.

The arguments presented by Ad Hoc Users and API do not counter these fundamental legal principles, particularly in the context of satellite companies. For example, both Ad Hoc Users and API contend that carriers should not be allowed to pass through their universal service contributions because such contributions are likely to be offset by rate reductions from the access reform and price cap orders. 20/ But satellite operators, whose services are unrelated to the

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[Footnote continued]

contracts themselves are likely to be relatively short, so the industry can adapt relatively quickly even there.

20/ Ad Hoc Users Petition at 9-11; API Petition at 3-4.

PSTN, will not be affected by these orders; for us, any universal service obligation would be an unmitigated cost increase with no offsetting benefits.

Further, Ad Hoc Users' contention that the universal service obligations were foreseeable is simply erroneous. 21/ Satellite providers, which historically have never been required to contribute to universal service, had no foreseeable notice that they would be subject to universal service contributions. Long-term private contracts between satellite operators and their customers generally have been in effect since long before the enactment of the 1996 Act, let alone the Commission's May 1997 *Order* which reversed the Joint Board's recommended decision in this regard. Satellite operators had no opportunity to reflect this new cost of doing business in their contracts.

The Ad Hoc Users and API incorrectly contend that the Commission's decision to allow carriers to pass through newly mandated universal service contributions is an unexplained departure from the Commission's previous policies and findings. 22/ To the contrary, the decision is completely consistent with the Commission's precedent on this issue. The Commission, 23/ backed by Supreme

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21/ Ad Hoc Users Petition at 6-7.

22/ *Id.* at 8; API Petition at 4-6.

23/ *See, e.g., MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300 (D.C. Cir. 1981), *appeal after remand, RCA Global Communications v. FCC*, 717 F.2d 1429 (D.C. Cir. 1983); *RCA American Communications, Inc.*, 86 FCC 2d 1197, 1199-1200 (1981), *aff'd in pertinent part on remand*, 94 FCC 2d 1338, 1340 (1983). The Ad Hoc Users acknowledge this body of precedent, but make the unsupported argument that there has been no demonstration in this docket of cause for allowing contract

[Footnote continued]

Court decisions, 24/ has long held that significant, externally-imposed cost changes, such as new taxes and regulatory levies, constitute "substantial cause" that would provide a "public interest" justification for a carrier to change its fixed term contracts to reflect these cost changes. Similarly, the Commission has recognized, in the context of carriers subject to price cap regulation, that unanticipated expenses or costs of business -- particularly those, like the universal service obligation, that are mandated by the Commission -- are beyond a carrier's control, and justify allowing the carrier to pass through those unanticipated expenses to their customers. 25/

Finally, the Commission should issue the clarification requested by the Cellular Telecommunications Industry Association ("CTIA") regarding the

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[Footnote continued]

revisions to reflect the new universal service obligation. To the contrary, "substantial cause" was argued (among others, by GE Americom), and the Commission's decision constitutes a finding that substantial cause has been demonstrated in this context. *Order*, ¶ 851; *see* GE Americom Comments on the Recommended Decision of the Joint Board at 10 (Dec. 19, 1996).

24/ *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). API asserts that the *Sierra-Mobile* doctrine applies to contracts between carriers, not to contracts between carriers and customers. However, the FCC drew on the same case law in creating the "substantial cause" doctrine applicable to a term contract between a service provider and any customer.

25/ *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6807 (1990), *recon.*, 6 FCC Rcd 2637 (1991), *aff'd sub nom. National Rural Tel. Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

statement in the *Order* that "this finding [that changes to existing contracts are warranted to reflect the new business cost of universal service contributions] is not intended to preempt state contract law." 26/ The only way to make sense of both this sentence and the rest of the paragraph is to read it, as CTIA does, as meaning that state contract law is not preempted except to permit universal service contributors to pass through to contract customers the contribution obligations related to serving them. The Commission cannot have meant, as the Ad Hoc Users suggest, 27/ to wipe out the holding of the entire paragraph with one stray sentence.

GE Americom emphasizes that it has no desire or interest in reopening its existing contracts with its customers. To the extent that the Commission clarifies its *Order* as GE Americom has requested, it will substantially mitigate this issue because most of GE Americom's preexisting contracts relate to bare space segment or to non-common carrier telecommunications offerings. However, to the extent that any revenue from term contracts is subject to the new universal service charge, GE Americom must be allowed to recover that cost.

26/ *Order*, ¶ 851.

27/ Ad Hoc Users Petition at 3-6.

CONCLUSION

For the reasons discussed above and in our own Petition, the Commission should grant Columbia's petition and affirm that satellite operators are required to contribute to the extent that they provide telecommunications service (but not otherwise); and that in particular making available bare space segment capacity on satellite transponders cannot be subject to universal service obligations because it does not constitute "telecommunications." The Commission also should deny the petitions of parties who would prevent universal service contributors from reopening long-term contracts to recover the new cost of doing business created in the *Order*.

Respectfully submitted,

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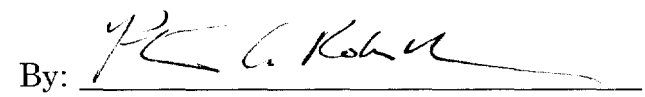
By: 

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I, hereby certify that on this 18th day of August, 1997, I caused to be served by hand delivery, copies of the foregoing GE American Communications, Inc. Comments Supporting in Part and Opposing in Part the Petitions for Reconsideration addressed to the following:

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